**IN THE SUPREME COURT OF SAMOA**

**HELD AT APIA**

MISC. 23121

**BETWEEN:** FARANI POSALA of Lalovaea trading as F.P. Architects

**Plaintiff**

**AND:** THE ATTORNEY GENERAL sued on behalf of the Minister of Lands

**Defendant**

**Counsel:** T.K. Enari for the Plaintiff
G. Powell and F. Tufuga for the Defendant

**Hearing:** 14 & 15 April 1998

**Judgment:** 15 April 1998

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## JUDGMENT OF SIR GORDON BISSON

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The Plaintiff has commenced two proceedings in the Supreme Court against the defendant claiming sums of money either for various services rendered and penalty interest or for damages for breach of contract by the defendant's unilateral termination of the contract of employment dated 4 October 1990.

One proceeding was commenced on 7 September 1993. It is described by Mr Powell as the general claim and the statement of claim has been amended twice by leave once on 14/11/94 and again on 27/3/98. A statement of defence as filed to each of those three statements of claim. The other proceeding was commenced on 17/11/94 and was amended by leave on 27/3/98 and a statement of defence filed on 7/4/98. Mr Powell referred to that as the Malae-o-Matagofie claim.

The plaintiff is a qualified architect who was engaged by the government of Western Samoa acting by and through the Minister of Lands to provide the professional services of a consulting architect in respect of certain residential houses and in particular in respect of the reconstruction of the Ministry's residential house at Malae-o-Matagofie (Pilot Point). The specific services to be provided were spelt out in Annexure A to the contract. The description of the various projects was set out in Annexure B and rates of remuneration in Part 1 of Annexure C and reimbursable expenses in Part 2. The plaintiff was to be remunerated by way of weekly progress payments on a percentage basis as set out in Part 1 of Annexure C.

I do not need to go further into the facts of case as the Court is faced with three motions, on which it has heard argument, and must reach a decision.

The defendant in two motions has moved for orders striking out each proceeding upon the grounds that,

> " the plaintiff has failed to give written notice giving reasonable information of the circumstances upon which the claim is based as soon as practicable after the accrual of the course of action AND the action by the Plaintiff was commenced after the expiration of one year from the date on which the cause of action accrued PURSUANT to section 21 of the Limitation Act 1975. "

The plaintiff has moved for an order pursuant to the Limitation Act 1975 Section 21(2) granting leave to the plaintiff to bring the action herein upon the grounds that:-

> " (a) Six years have not expired since the cause of action accrued herein;
>
> (b) The failure to give notice and the delay in bringing the action was occasioned by mistake and
>
> (c) The Defendant has not been materially prejudiced in his defence by the delay in giving notice and filing the action."

In support of the defendant's motions to strike out, an affidavit has been sworn by the Attorney-General stating that in neither of the plaintiff's two proceedings is reference made to the notice required by s.21 (1) (a) & (3) of the Limitation Act 1975. It is further stated that no such notice has been received in either case, and that is accepted as the position by the plaintiff. What is absent from this affidavit is any claim that the failure to give notice materially prejudiced the defendant in his

defence or otherwise. Nor has Mr Powell raised any questions so prejudice so I proceed with the plaintiff's motion on that basis.

In support of the plaintiff's motion for leave to bring the action, Mr Enari, as solicitor for the plaintiff has sworn an affidavit. He deposes that the contract was entered into on 4 October 1990 and terminated by the Acting Minister of Lands on 20 October 1990 and that the last payment for claim's was made on 30/4/93. He says that correspondence with the Attorney General's office was begun in September 1993 and continued up to 1998. No mention has made in that correspondence on behalf of the Attorney-General to the provisions of the Limitation Act 1975 s.21 which deals with a time limitation for actions against the Government. Nor was such a defence raised in the statement of defence filed on 6/9/93 and again on 17/1/95. The discovery process continued to March 1998. Then further amended statements of claim, which brought the claims up to date were filed with leave on 27/3/98. Statements of defence were filed on 7/4/98, that is only one week before this fixture for the trial, and this was the first time that the defendant pleaded s.21 of the Limitation Act 1975.

Mr Powell for the defendant submitted that the Court has no jurisdiction to grant leave under s.21(2) of the Limitation Act for the plaintiff to bring the action. He cited a judgment of Bathgate J dated 23/6/87 in ***Milford Builders Ltd.*** v ***Western Samoa Shipping Corporation***, ***Attorney General*** and anotherr (1980-1983) WSLR 235 in which he held, p.253.

"Under subsection (2) there is no power given to the Court to grant leave in respect of an action already commenced for that action to continue, where no notice at all has been given as in the present case".

Bathgate J cited ***Watch Tower Bible and Tract Society v Huntly Borough*** (1959) NZLR.821 in which Shorland J, giving an oral judgment forthwith under the corresponding s.23 (2) in the Limitation Act 1950 of New Zealand said at p.823.

"I am of the opinion that leave granted cannot operate retrospectively so as to give validity to proceedings already commenced....."

However, the judgment of Shorland J in that case has been overruled by the Court of Appeal by the majority decision of North and Cleary JJ in ***Auckland Harbour Board v Kaihe*** (1962) NZLR.68. That was an appeal from the judgment of Shorland J sitting with a jury in a personal injury damages claim in which it was argued that notice under s.23 (1) (a), had not been given as soon as practicable. In the Court of Appeal Cleary J said in delivering the judgment of the Court -

> "When a question arises as to whether a notice has been given as required by s.23 of the Limitation Act 1980, the principal matters of assistance (as opposed to questions of procedure) that fall to be considered are:-
>
> 1) Was a notice given as soon as practicable?
> 2) If not, should the failure to give notice be excused by reason of mistake or other reasonable cause, or, alternatively, was the defendant materially prejudiced by the failure?
> 3) If there be either reasonable cause for the failure, or no material prejudice to the defendant, is it just for the Court to excuse the failure? The matter was not approached on these lines in the present case, clearly because the learned Judge had in mind certain rulings in which it was laid down that once an action has been commenced it is too late to ask the Court to excuse the failure to give the notice as soon as practicable. Shorland J. himself had expressed this opinion in Watchtower Bible and Tract Society v Huntly Borough (1959) N.Z.L.R. 821, and the same view was afterwards adopted in other cases. "

Turning to the three questions posed by the Court of Appeal, I would answer them as follows (1) no notice was given (2) failure to give notice was by reason of mistake and the defendant has not been materially prejudiced by the failure; (3) it is just for the Court to excuse the failure.

The Court of Appeal was dealing with one particular situation in which, to meet the ends of justice, the fact that the proceeding had already been brought did not preclude the Court from granting leave under s.23 (2). I do not take that case as holding that this was the only circumstance in which that might be done. I cite the following two passages from the Judgment:-

> "It would be a most extraordinary result if the statute required such a plaintiff to abandon the proceedings he had issued; and apply to the Court for leave to commence a fresh action on the footing that he had not given notice as soon as practicable, the plaintiff at the same time protesting that he had done so."
>
> **And**
>
> "the defendant, who has been found negligent and liable to compensate the plaintiff for the injuries he received, asks the Court at this stage to non-suit the plaintiff, with the result that the plaintiff would now be obliged to apply for leave to commence a fresh action and ask the Court to excuse a failure which the learned trial Judge said he would undoubtedly have excused but"

"for his belief that he had no jurisdiction to do so. A further trial would mean that Judge and jury would again be occupied in hearing a dispute which has already been determined against the defendant on the merits by findings not now called in question. The same consequences would follow if a notice, although given as soon as practicable, inadvertently failed to supply some of the information prescribed by para. (a) of s.23(1). We are not disposed to think that the section was intended to result in difficulties and consequences of the nature discussed unless we find its language intractable."

The Court applied the following principle from ***Rendall v Blair*** (1890) 45 Ch. D.139, 158

" if leave had been necessary it could be obtained after the commencement of the action which should, if necessary, be stood over to enable the leave to be obtained. Bowen L.J. expressed the view that the section was directory, and said: "It directs what ought be done. Unless the duty is complied with by the litigant the Court must hold its hand. But it does not oblige the Court to close the gates of mercy upon the applicant, but enables it to stay proceedings until that consent, which as a matter of duty ought to be obtained in the first instance, is obtained at last. "

On that principle the Court held,

" So far as concerns compliance with para. (a) of s.23 (1), the section should be read as directory only, so that if it should appear during or at the end of the trial that the provisions of that paragraph have not been fully complied with the Court may then, if it thinks fit to do so, excuse non-compliance by granting leave to proceed with the action. It is clear that the learned trial Judge would have granted any necessary leave to the plaintiff if he thought he had power to do so, and this Court should now grant the leave which, as we think, the trial Judge had power to grant."

I respectfully adopt the same approach in this case in which no notice had been given. The interests of justice demand the same approach and I note that leave may be granted under s.21 (2) "whether or not notice has been given"

This is a case in which the defendant has been fully aware of all the circumstances of the plaintiff's claims from the outset. There have been 25 letters between the parties from 27/9/93 to 19/3/98 listed in Mr Enari's affidavit. I set out in full the letter of 9 February 1998 from the Office of the Attorney General to the plaintiff's solicitors. It plainly shows that the defendant was addressing the claims of the plaintiff and not contemplating any bar to them.

" GOVERNMENT OF WESTERN SAMOA

**Office of the Attorney General**

9 February 1998

Kruse Enari & Barlow
Barristers and Solicitors
NPF Building
APIA

(ATTENTION: Tuala Enari)

Dear Sirs,

Re: F.P. ARCHITECTS v. ATTORNEY GENERAL

Please refer to your letter dated 9 September 1997. I wish to make the following observations in response to your table submitted. My apologies for the late reply.

(a) Could you please clarify method of calculation for all general damages. It is clear under clause 7.2 of the Contract that general damages are calculated at 25% of the total aggregate of fees and costs claimed by your client. Basically, my calculations using the same formula is different from your figures.

(b) That I am trying to confirm the number of days for late payment on each house as you indicated although most of your calculations are correct with some discrepancies on several houses as noted in my amended table of figures.

(c) That it is my understanding that each house without any figures or claims of interest besides is held to be cleared from all claims by your client.

(d) That with respect to the table I originally submitted, I made comments that some don't have copies of claims by your client while other claims have no vouchers. I wonder whether or not you are in the position to verify or furnish such information's.

(e) That in relation to point 3 above, would it be correct then to say that the following houses are not included by your client's claim as far as interest and general damages are concerned. House numbers: 7, 11, 18, 32, 44, 45, 49, 50, 50A, 53/53A, 54, 54A, 56, 56A, 60, 65, 70, 73, 78, 87, 97, 98, 99, 100A, 122, 125A.

I would furnish you with copy of my table of figures, in the very near future in response to the table submitted. Your answers and views to above comments is humbly requested.

Yours faithfully,

(Fagaloa L.S.R. Tufuga)
STATE SOLICITOR "

If ever there were a case in which the justice of the case calls for the claims to proceed, to trial, it is this. It may be that there are defences to the claims, I make no comment on the merits of the case,

but the last minute plea of the Limitation Act on 7 April 1998 so soon after the letter of 9/2/98 set out above, with no prejudice claimed by the defendant, leaves me in no doubt that leave sought by the plaintiff should be granted if his application has been made before the expiration of 6 years from the date when the cause of action accrued.

I come to when the cause of action arose. Counsel have not sought to differentiate between the two proceedings in this regard. Mr Powell contended that the cause of action arose at the end of October 1990 when the defendant terminated the contract. However payments continued to be made by the defendant to the plaintiff until 30 April 1993, so it was not until that date that the defendant rejected some progress payment claims and the plaintiff's cause of action in respect of those claims accrued then. That being the case the plaintiff's motion for leave is within 6 years of that date.

As to s.21 (1) (b) requiring the action to be commenced before the expiration of one year from the date on which the cause of action accrued, one proceeding was brought within one year of 30/4/93 and I find that the defendant consented to the other being brought on 17/11/94 within six years which meets the third proviso to s.21 (1) (b). That the defendant did consent to both actions proceeding is evident from pleading to the claims and joining in applications for fixtures. Again the justice of the case calls for the plaintiff's motion to be granted.

For these reasons I dismiss the two motions by the defendant to strike out the proceedings and grant the plaintiff's application to bring the actions which he has brought.

There is one further matter that concerns me. The contract provides in para 6.1 for arbitration:-

> "6.1 **ARBITRATION**
>
> Any disputes under or arising out of this Agreement shall be referred to arbitration of a single arbitrator under the provisions of the Arbitration Act 1976."

In a letter received by the plaintiff's solicitors on 27/9/93 the Attorney-General's office wrote as follows:-

" GOVERNMENT OF WESTERN SAMOA

**Office of the Attorney General**

Mr Apa & Enari
Solicitor
Wesley Arcade
**APIA**

(**ATTENTION**: Mr T.K. Enari)

Dear Sirs,

**ATTORNEY-GENERAL ats FARANI POSALA**

I refer to summons and statement of claim served on this Office in relation to abovenamed matter.

A copy of the agreement provided to me by the Department of Lands, Surveys and Environment indicates that the dispute should be referred to arbitration pursuant to clause 6.1 of Annexure C.

To avoid costs and unnecessary delay I would ask that you withdraw your claim and advise me whether you wish to refer the matter to arbitration.

Yours faithfully,

(Michael B. Edwards)
**PRINCIPAL STATE SOLICITOR**

**Recd. 27/9/93** "

Obviously arbitration was not pursued; and the Court action as I have held consented to by the defendant. However, I am satisfied this dispute is ideally suited to arbitration. The dispute consists wholly or in part of matters of account and would involve prolonged examination of documents such as claims for progress payments and local investigation of the work done. Furthermore the defendant alleges that the unilateral termination of the plaintiff's employment contract was a breach of contract particulars of which are:-

> "(a) the Plaintiff failed to exercise all profession care in carrying out his obligations under the Contract;
>
> (b) the Plaintiff failed to keep himself informed of the needs of the Defendant; and
>
> (c) the Plaintiff breached an implied term of the contract to keep all costs at a minimum."

These are matters very much of the kind which arise in building disputes and are better suited to arbitration than to be litigated in Court. For those reasons I exercise the power given to the Court under s.19 of the Arbitration Act 1976 and order that the whole of both causes of action be tried before

an arbitrator agreed upon by the parties or before an officer of the Court. When I raised the question of arbitration to counsel the only difficulty they raised was finding a suitable arbitrator but that should not be insurmountable.

I should add before completing and signing this formal judgment that Mr Enari raised the argument that the defendant was estopped by its "change of course not just in mid-steam but at the eleventh hour" and he cited Andrews v Colonial Mutual Life Assurance Society Ltd. (1982) 2 NZLR 556 at pp 568 & 569. There is an extensive coverage of estoppel and waiver in the dissenting judgment of Gresson P. at pp 87 to 90 in Kaihe (supra) in which he said, at p.88

> "Estoppel is based on the principle that it would be inequitable to allow a person who by a representation or by conduct amounting to a representation has induced another to act as he would not otherwise have done to deny or repudiate the effect of the representation."

While the doctrine of estoppel could apply because it would be inequitable for the defendant to raise the statute at this late stage and be unfair or unjust to allow the defendant to do so, I prefer to deal with this case on the basis of waiver. For waiver to apply Gresson P said, at p.88.

> "I do not question that it would have been competent for the appellant to waive compliance with the provisions of the Statute" (the statute being the New Zealand Limitation Act 1950 s.23).

> "I do not think the appellant Board is precluded from pleading the want of timely notice unless there can be attributed to it conduct indicative of an intention or willingness to waive the statutory provisions".

> "In the case of waiver some district act must be done to constitute a waiver".

I am satisfied that in this case the defendant did waive the provisions of s.21 of the Limitation Act 1975 not by only one distinct act but by the defendant's course of conduct. There was the acceptance of court action in lieu of arbitration and in neither respect was notice under s.21 (1) raised. There then followed over the course of five years the respondent's full participation in the Court proceedings including the filing of statements of defence, requests for fixtures, requests for adjournment and for a deposition for a witness about to go overseas, and discovery and of course correspondence

without one word referring to the statute until the amended statement of defence dated 7/4/98 and the Motion to Strike Out of the same date. I consider that the defendant by this course of conduct by implication abandoned rights under s.21 as the respondent's conduct was inconsistent with the continuance of those rights. I hold that the defendant waived its rights under s.21 and that it would be unfair or unjust to allow the defendant to assert those rights after five years without doing so, at this late stage placing the plaintiff in an invidious position. On this further ground the plaintiff is free to pursue his claims without leave being required under s.21 (2) but subject to the Court's order for arbitration.

No application for costs

No order as to costs